[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

October 7, 1934.

[APPELLATE JURISDICTION]

THOMAS, C. J. (F.M.S.), GERAHTY & MILLS, JJ.

February 27, 1932

In the Matter of the trusts of the Will of TAY GEOK TEAT deceased dated 16th day of July, 1885.

SUNNY TAY alias TAY KIM CHENG alias SOH KIM CHENG an infant by O TEI his mother and next friend.

Plaintiff (Appellant)

vs.

SEOW SEE NEO and CHAN SENG BEE substituted by an Order of Court dated the 17th day of July, 1933, the trustees of the said TAY GEOK TEAT deceased.

Defendants (Respondents)

[SINGAPORE ORIGINATING SUMMONS No. 29 of 1932]
[SINGAPORE APPEAL No. 11 of 1933]

Chinese Marriage—Union between a Chinese with a Japanese woman—presumption from cohabitation and repute—legitimation by recognition.

A secondary marriage between a Chinese man and a Japanese woman may on proper evidence be presumed from cohabitation and repute and also from recognition of issues as legitimate children.

AN APPEAL from the Order of Terrell, J. dated the 7th October, 1932.

By Originating Summons dated 13th February, 1932 the plaintiff appellant claimed as a beneficiary and *cestui que trust* of and under the Will of Tay Geok Teat deceased for administration of the Estate of the deceased, accounts and other consequential relief. By Clauses 3 and 5 of the Will the testator directed that the property therein mentioned should upon the happening of certain events be sold and the proceeds divided equally between the sons of five named sons of his son Tay Kim Tee and the sons of any other sons of Tay Kim Tee who may be alive at the time of the death of the last survivor of the said five named grandsons. One of the sons of Tay Kim Tee was Tay Boon Teck and the plaintiff appellant claimed a share in the estate as a lawful son of Tay Boon Teck. The legitimacy of the plaintiff appellant was disputed and upon the hearing of the Originating Summons the Court ordered an issue to be tried with pleadings as to whether the plaintiff appellant was a legitimate son of Tay Boon Teck by his wife O Tei. This issue was tried by Terrell, J. who held that the plaintiff appellant was not a legitimate son of Tay Boon Teck.

Cobbett (*C. J. Koh* with him) for the plaintiff.

Williamson (*S. Fung* with him) for the 1st Defendant, George Bennett Taye a trustee of the Estate of Tay Geok Teat Deceased.

Koek for the 2nd Defendant, Ching Keng Lee another trustee.

Cur. Ad. Vult.

TERRELL, J.—This was the trial before me of an issue whether one Sunny Tay was the legitimate son of Tay Boon Teck by his wife O Tei. There is no dispute that Sunny Tay was the offspring of Tay Boon Teck and O Tei, and the only question for decision is whether O Tei was the lawful secondary wife of Tay Boon Teck.

There can be no doubt that Sunny Tay and his sister Juliet were fully recognised by Tay Boon Teck as his children. From the age of 3 and 4 they were maintained in the family house in Alexandra Road until Tay Boon Teck died. They called Tan Poh Neo, Tay Boon Teck's lawful wife, *Ma China*, no doubt to distinguish her from their natural mother who was a Japanese. They also attended their father's funeral dressed in sackcloth and Sunny Tay carried a bamboo stick in exactly the same way as their father's son by Tan Poh Neo. There would be no difficulty on the evidence in finding that Sunny Tay was legitimate if he could lawfully be legitimised by recognition. In the first *Khoo Thean Tek* Appeal, 1926 A.C. at page 543, Lord Phillimore suggests that it is a possible jural conception that a child may be legitimate though its parents were not legitimately married. This is apparently a principle which was admitted by the Canon Law which governed Western Europe, and is undoubtedly in accordance with Chinese custom. However, the second *Khoo Thean Tek* appeal makes it abundantly clear that although Chinese custom has been followed to the extent of recognising polygamy the principle of legitimation of children by recognition has never been part of the law applied to persons of Chinese race in the Straits Settlements. It follows therefore that recognition of the children is not enough—there must have been a lawful union between the father and mother, and in the second *Khoo Thean Tek* Appeal, (1930) A.C. at page 358, the Privy Council go further and say that the mere fact of recognition of a person as a son does not raise any presumption of marriage between the parents. The question arises therefore as to what particular circumstances differentiate the status of a secondary wife from the position of a kept mistress.

It is possible to extract from the reported cases some indication of the kind of evidence which should satisfy the Court that the union was such as the law recognises. Proof of a marriage ceremony would no doubt be conclusive

but such proof is not always forthcoming, and frequently unsatisfactory. In the *Tan Ah Loy* case, for instance, the evidence of any ceremonies was disbelieved by the Registrar (see 1920 A.C. at page 376), though in that case it was found by the Court of Appeal—and this finding was approved by the Privy Council—that a ceremony though usual was not essential. It must be remembered, however, that Tan Ah Loy had been living in Ah Kwee's house since she was ten years old and was so living at the time that Ah Quee and Tan Ah Loy became husband and wife. It is particularly stated by Earnshaw, J. in the Court of Appeal (XIV S.S.L.R. at page 90) that in those circumstances there was no necessity for any marriage ceremony according to Chinese custom. This case is not definitely an authority for the proposition that when a secondary wife is taken from outside the household a ceremony is unnecessary. Perhaps a more correct statement of the law would be that if the evidence of the recognition of the marriage is satisfactory the ostensible relation of the parties should be referred to a legitimate rather than to an illegitimate origin, *Ong Cheng Neo* v. *Yeap Cheah Neo*, L.R. 6 P.C. page 281, or in other words ceremonies, if and so far as they were necessary, might be presumed. At the most such ceremonies are only evidence of an intention to effect a permanent union, and if such intention can be gathered *aliunde* evidence of a ceremony becomes superfluous. It is to be remarked that in the *Six Widows'* Case (12 S.S.L.R. at page 128) one Way Kim Feh stated in his evidence "there is no distinction between a woman taken from a brothel or brought without a ceremony and a woman who goes through a ceremony; there is no distinction legally or socially." This evidence was relied on by the learned Chief Justice in that case and was approved by Deane, J. in the case of *Woon Kai Chiang* v. *Yeo Pak Yee & others*, (1926) S.S.L.R. at page 51.

Another element for consideration is the recognition of the children. It is true, as stated above, that in the second *Khoo Thean Tek* Appeal the recognition of the children is stated to raise no presumption of marriage between the parents, but in the *Tan Ah Loy* case the fact that Tan Ah Loy had three children by Ah Quee was certainly taken in consideration by Sir John Bucknill who presided over the Court of Appeal in that case and his reasons were approved by the Privy Council (see 1920 A.C. at page 377). Again Deane, J. in *Woon Kai Chiang* v. *Yeo Pak Yee & others*, 1926 S.S.L.R. at page 51, whilst stating that his conception of a Chinese marriage is the permanent union of a man and woman adds that if offspring results that of course accentuates it. I take it, therefore that although the recognition of the children does not raise a presumption of the marriage of the parents, it is certainly an element to be considered in that failure to recognise the children would be practically conclusive that the parents were not husband and wife.

While it is unnecessary to examine the particular evidence which satisfied the Court in the *Six Widows'* Case (12 S.S.L.R. page 120), the *Tan Ah Loy* case (1930 A.C. page 369), and the case of *Ngai Lau Shia* (XIV S.S.L.R. page 35), that the status of a secondary wife had been established, it is clear from these cases as also from the *Khoo Thean Tek* case (1930, A.C. page 346) that there must be recognition of such status not only by the parties themselves but by the members of his family and that the union must have an element of permanence.

Except in one or two details the facts of the present case are not really in dispute. I take it to be established that Boon Teck first met O Tei when she was serving as a waitress at the Toronaya, a Japanese hotel in Beach Road, Singapore, in 1910. Boon Teck was a volunteer and the hotel was opposite the Volunteer Headquarters, and Boon Teck and his friends used to visit there frequently and apparently competed for O Tei's favours. In such competition Boon Teck was successful and later took O Tei away to live with him at his family house in Alexandra Road where he normally lived with his wife Tan Poh Neo and her children. O Tei admits that they lived together as man and wife in the Hotel for a month before he took her to Alexandra Road. O Tei says that there was a marriage ceremony at a Chinese Temple in Pasir Panjang—the only persons present besides Boon Teck and O Tei being O Tei's adopted parents who were Japanese and ran the Toronaya Hotel. It is not suggested that any members of Boon Teck's family were present at the ceremony. It appears to me that if there had been a ceremony some members of the husband's family would have been present. In view of the month's cohabitation in the Toronaya Hotel before O Tei was taken to the family house I think a ceremony was unlikely and I am quite unable to accept O Tei's uncorroborated testimony on this point.

O Tei lived in the family house in Alexandra Road with the principal wife Tan Poh Neo for about a year. Then in August or September 1911 becoming pregnant she entered the General Hospital and her daughter Juliet was born. She never went back to the family house as her permanent residence. After the birth of Juliet she went back to the Toronaya Hotel. Boon Teck was at that time the manager of a Malay Opera Company and his business took him to Penang where he remained some six months leaving his wife and child at the Toronaya Hotel. Later he took O Tei to Penang for a few months returning with her to the Toronaya Hotel. Shortly after this the hotel was sold and O Tei and her adopted parents took a house in Syed Alwi Road, Boon Teck and the adopted parents sharing the rent.

Whilst staying here O Tei again became pregnant and Sunny Tay was born. After the birth of her son O Tei went to live in a Hotel in Selegie Road with her two children. Boon Teck was at this time employed in the Tramway Company whose offices are close by in Mackenzie Road. It would appear that Boon Teck lived with O Tei in a room in the hotel in Selegie Road spending his weekends in the family house in Alexandra Road.

O Tei must have lived in the Selegie Road house from 1912 to 1916 or 1917. In 1915 Boon Teck took the two children aged 3 and 4 respectively to the family house in Alexandra Road and there they remained till Boon Teck's death in 1922. O Tei visited them fairly regularly and occasionally stayed a night, or two but she lived there permanently. From 1916 to 1918 O Tei lived with Boon Teck in various other premises in the neighbourhood of the Tramway offices but he appears to have ceased cohabiting with her after 1918. O Tei says that he maintained her until 1921 after which he abandoned her. In 1922 he died but O Tei did not attend the funeral. She did not even hear of his death until some time afterwards. It is to be presumed therefore that she had ceased visiting her children in Alexandra Road. Very soon after Boon Teck's death she lived with Soh Chye Watt whom she married before the District Judge some years later in 1928. Soh Chye Watt made a home for her and her children and looked after the children's education. Except for a few weeks immediately after Boon Teck's death his family had nothing more to do with O Tei's children. They never worshipped at their father's grave; they did not even know where it was.

Now the onus is on the plaintiff to prove that the union between Boon Teck and O Tei was intended to be permanent, and the fact that such a union was in fact severed before the death of Boon Teck is an important consideration. It is immaterial to record any finding whether, as the defendants allege, Boon Teck severed the connection because of O Tei's association with her present husband in 1918 or even earlier, or whether she had nothing to do with Soh Chye Watt until after Boon Teck's death, as it is admitted that for one reason or another the union was in fact severed in 1921. In the *Khoo Thean Tek* case, 1930 A.C. the following passage appears at page 353:—

> "But even taking the outside limits of its duration—namely between 1848 (when the legitimate daughter was born) and 1861 (when Petronella married Cornelius), their Lordships are of opinion that there is no evidence that the parties intended their union to be permanent in its nature. Moreover, the fact that the association between the parties was in fact severed affords strong evidence that Petronella was never a *t'sip*, for according to the evidence of Mr. Beatty the only expert on Chinese custom who was called a *t'sip* cannot be put away who has born a son and 'in the Straits Settlements there is no divorce provided for by the laws for the Chinese '."

O Tei's evidence in cross-examination was as follows:—

> "He lived with me till 1918 and maintained me till 1921. In 1921 we had a quarrel—it was not in 1920. The quarrel was because he did not come to see me as often as he used to and was improperly keeping another establishment. I took no steps to get maintenance from him. Did not report to the Protector of Chinese. He had simply left me and determined the relationship."

I do not say that it is impossible to suppose a case in which a union may have been intended to be permanent and may have been wrongfully severed by one of the parties, but the mere fact of severance cannot fail to be of importance where such a step has been accepted without protest by the other party to the union.

The evidence adduced by the plaintiff of O Tei's recognition as Boon Teck's wife falls under two heads, first her recognition whilst staying in Selegie Road, and secondly her recognition in the family house at Alexandra Road.

As regards her recognition in Selegie Road, there can be no doubt that Boon Teck introduced O Tei to a European called Freeman and to an English-speaking Tamil called Andrew as his wife. I think he would naturally do so rather than admit that he was merely keeping a mistress in a Japanese hotel and I do not think that this evidence is by any means conclusive as to what Boon Teck's real ideas on the subject were. Soh Chye Watt also states in his evidence that O Tei was looked upon as Boon Teck's wife though she was not introduced to him as such except by a Mr. Pereira who was not called as a witness. The value of his evidence is considerably diminished by the fact that in 1928 when he was seeking to get married to O Tei before the District Judge he described her in his declaration as a spinster.

The evidence of recognition in the family house rests almost entirely on the evidence of Boon Teck's sister Tay Tan Neo. Unfortunately I cannot regard her either as an intelligent or satisfactory witness. Though not old she appeared to be in poor health and complained of giddiness and had frequent recourse to a bottle of smelling salts. She says that the principal wife, who is now dead, told her that O Tei was the second wife "*bini* No. 2" and that O Tei took part in worshipping the ancestors on the appropriate days, but Tay Tan Neo was married

and did not live in the house and only visited it occasionally. She was obviously anxious to do her best for O Tei and her children and I cannot place too much reliance on her evidence. It is also possible that the principal wife would try to put the best complexion on the affair by suggesting that O Tei was a secondary wife. Otherwise she would have to admit that her husband was harbouring a kept Japanese mistress under the same roof as herself. It is a fair inference that as it was, she found the position intolerable and this would account for the fact that after the first year O Tei no longer resided in the family house.

There is however, one statement in Tay Tan Neo's evidence which I regard as of importance. According to Chinese custom she called her sister-in-law Tan Poh Neo 'Ang Soo,' but she called O Tei by her name. There can be no doubt that if O Tei had been treated as a *t'sip* she would have called her 'younger sister.' This is supported by the evidence of O Tei herself. She says that everyone including Boon Teck's younger brothers Boon Kay and Boon Poh called her O Tei, and not by any name signifying a relationship by marriage. I think this evidence is very strong in favour of the supposition that O Tei was not regarded as a secondary wife.

There is one other piece of evidence to which I must refer. In 1917 O Tei registered as an alien under the Registration of Aliens Ordinance 1917. She described herself as living in Selegie Road and being the employee of Chinese. Although too much reliance need not be placed on this piece of evidence as she was in fact Japanese by birth and dressed as one, and non-registration might have caused difficulty with the authorities enforcing the provisions of the Ordinance during the war, her declaration is entirely inconsistent with her story that she was living in Selegie Road as the wife of a British-born Chinese.

It would appear that in 1930 O Tei at the instigation of Soh Chye Watt put forward her son's claim to a one-seventh share in the residuary estate of his great-grandfather Tay Geok Teat deceased. There were discussions between Soh Chye Watt and G. B. Taye, one of the trustees and also a beneficiary in the estate, and as a result it was arranged that the trustees should admit the plaintiff's claim to a seventh share in the estate, and G. B. Taye wrote to O Tei to this effect on November 12th, 1930 (Exhibit B). O Tei was, however, required to give consideration for this admission and on the same day signed a letter, (Exhibit H) addressed to G. B. Taye's brothers, Tay Boon Kay and Tay Boon Poh, agreeing to pay them 3/7ths of any benefit which Sunny Tay might get under the Will. G. B. Taye admits that this 3/7ths share was to be divided between his two brothers and himself. He says they felt sorry for Sunny Tay as they had no doubt that his claim could not be upheld. They succeeded therefore in giving effect to their generous sentiment without suffering more than a negligible loss themselves, as their shares of 1/6th each would, after admitting Sunny Tay's claim, be 1/7th—1/7th x 1/7th i.e. 8/49th instead of 8/48ths. This admirable arrangement would of course have been at the expense of the other beneficiaries, but as they were widows and infants, they naturally were not considered. Apparently however, some of these beneficiaries must have raised objections and in November 1931 the trustees ceased paying the allowance which had been part of the arrangement made in November, 1930 and shortly afterwards these proceedings were commenced. I only mention these incidents to dispel any idea that Sunny Tay's claim was honestly admitted in 1930. All that happened was that certain of the beneficiaries attempted to make an arrangement behind the backs of the other beneficiaries who were not consulted. In these proceedings the respondents represent all the beneficiaries interested in the Will, and it is quite clear that no admission made one of the trustees in 1930 under the circumstances above related can possibly bind the estate.

On the facts as summarised above I have no doubt that the evidence which has been adduced falls far short of establishing any intention to contract a permanent union. The evidence indicates that neither Boon Teck nor O Tei herself ever treated it as such, and the evidence of a reputed marriage is either unsatisfactory or capable of a different explanation. In the result Sunny Tay has not discharged the onus of proving a lawful union between O Tei and Boon Teck such as would entitle him to share in his great-grandfather's estate.

The result is in many ways unsatisfactory. So long, however, as the legitimacy of the child must be measured by the test of whether there was a lawful union between the father and mother —a test entirely foreign to Chinese ideas—cases of hardship must occur as the recognition of the children raises no presumption of a marriage between the parents. It is a situation which can only be remedied by legislation for the purpose of bringing the law more in accordance with Chinese ideas.

On the issue, therefore, it will be declared that Sunny Tay is not a legitimate son of Tay Boon Teck by the said O Tei.

Judgment accordingly.

Solicitors for the Plaintiff—*Aitken & Ong Siang.*

Solicitor for the 1st Defendant—*S. Fung.*

Solicitors for the 2nd Defendant—*Chan & Eber.*

The plaintiff appealed *in forma pauperis*. The appeal was heard before Thomas, C. J., (F.M.S.), Gerahty and Mills, JJ.

Mallal for the Appellant.

K.K. O'Connor for the Respondents.

Mallal for the Appellant. In this case it is not contended that Boon Teck married O Tei as a principal wife, that is to say, with the accompaniment of the usual Chinese marriage rites. What is contended is that there was a secondary marriage. For such a marriage no rite or ceremony is necessary [*Choo Ang Chee v. Neo Chan Neo & ors.* (*Six Widows' Case*) 12 S.S.L.R. 120 and *Cheang Thye Phin* v. *Tan Ah Loy*, (1920) A.C. 369; 14 S.S.L.R. 79].

Marriage among the Chinese may be inferred from the evidence that the parties intended to live together as man and wife. The evidence of such marriage can only be the fact of cohabitation coupled with the reputation of being married. The nature of evidence to prove such marriage would be the same as that required to prove marriage "by habit and repute" of the English and Scotch laws.

Marriage in this case should be presumed from the fact that—

(1) The parties cohabited together for a period of 11 years.
(2) The parties were reputed to be married and Boon Teck acknowledged O Tei as his wife and treated her as such.
(3) Boon Teck and his relative treated the plaintiff as his legitimate son.
(4) The plaintiff was brought up in the family house.

In cases of this kind the Courts should be guided in weighing evidence by the following three principles (1) In cases of pedigree even remote and slight evidence is allowed effect and the Courts are obliged to depart from the strict rules of evidence, *Vowles* v. *Young*, 13 Ves. Jnr. 140. This decision is followed by the Court of Appeal in *Seow Beng Hay* v. *Seow Soon Quee*, 2 Mal.L.J. p. 111.

(2) There is a strong legal presumption in favour of marriage, particularly after a long lapse of time and this presumption can only be met by strong, distinct and satisfactory disproof. It can only be negatived by disproving every reasonable possibility. *Piers* v. *Piers*, 2 H.L.C. 331; 9 E.R. 1118.

(3) The law presumes against vice and immorality, and on this ground in favour of marriage and of legitimacy of children. *Best on Evidence*, p.309.

There is evidence of cohabitation from 1910 to 1921, though Boon Teck did not live with O Tei after 1918. It has been proved that O Tei was introduced as his wife by Boon Teck to his friends. It is also in evidence that the appellant was recognised as the legitimate son of Boon Teck. Recognition is an important element to be considered. Section 50 Ordinance No. 53 (Evidence). *Ameer Ali on Evidence*, pp.466 and 467 note (6). In *Seow Beng Hay* v. *Seow Soon Quee & anor.* expert evidence shows that it is unusual for an illegitimate son to live in the family house. In the Court of Appeal the President, the learned Chief Justice, accepted that evidence. If there is evidence that the appellant was treated as a legitimate son, it helps the presumption of a lawful union. *Woon Kai Chiang* v. *Yeo Pak Yee & others*, (1926) S.S.L.R. 27 at p. 42; *Cheang Thye Phin* v. *Tan Ah Loy*, (1920) A.C. 369; *Ranjee Khujooroo Nissa* v. *Jehan*, 3 I.A. 291.

Counsel then cited a number of English cases, the following among others:—

Campbell v. *Campbell*, (*The Breadalbane Case*), 1 Scotch & Divorce Appeal Cases 182.

Goodman v. *Goodman*, (1859) 28 L.J. 745.

Hill v. *Hibbit*, (1870) 25 L.T. 183.

Lyle v. *Ellwood*, (1874) L.R. 19 Eq. Cas. 98.

Sastry Velaider Aronegary v. *Sembecutty Vayalie*, (1881) 6 App. Cas. 364.

Re Thompson Langham v. *Thompson*, (1904) 91 L.T. 680.

Re Haynes, (1906) 94 L.J. 431. He also cited *Yeap Cheah Neo* v. *Ong Cheng Neo*, (1875) L.R. 6 P.C. 381; *Choo Ang Chee* v. *Neo Chan Neo and ors.*, (*Six Widows' Case*), 12 S.S.L.R. 120; *Ngai Lau Shia* v. *Low Chee Neo*, 14 S.S.L.R. 35; *Cheang Thye Phin vs. Tan Ah Loy & ors.* 14 S.S.L.R. 79; L.R. (1920) A.C. 368; *Woon Kai Chiang* v. *Yeo Pak Yee & ors.*, 1926 S.S.L.R. 27.

O'Connor for the Respondents. The trial Judge was right in law and in his conclusions on the facts. The onus of proving his legitimacy was on the appellant and he has failed to discharge that onus.

A Chinese may have *t'sips* or secondary wives and their children are legitimate. Proof of ceremony is not necessary. *Cheang Thye Phin* v. *Tan Ah Loy*, 1920 A.C. 369. Union with a *t'sip* is regarded in law as of a permanent nature and if a marriage with a *t'sip* is sought to be established it must be shown that the union was intended to be of a permanent character, *Khoo Hooi Leong* v. *Choo Yong Kin*, (1930) A.C. 346 and *Re Khoo Thean Tek's Settlements*, (1928) 2 S.S.L.R. p. 178. The Chinese custom of legitimation of a son by subsequent recognition is not law in the Straits Settlements. Recognition as a son raises no presumption that the son's mother was a secondary wife, *Khoo Hooi Leong v. Choo Yong K'n*, 1930 A.C. 346. The case of *Seow Beng Hay* v. *Seow Soon Quee*, 2 Mal. L.J. 111 is incorrectly decided in so far as it depends on recognition of the son.

The law of the Colony is the law of England (as modified to prevent injustice), not the law of Scotland. Scotch cases have been cited in support of the appellant's case. Such cases ought not to be cited as authorities unless it is proved as a fact being foreign law that Scots law is similar to the law of the Colony. Scots law greatly differs from the law of the Colony and the Court does not know what the law of Scotland is. In any case a marriage in Scotland is a monogamous union whereas this is a polygamous union and different considerations would apply.

Habit and repute must be among some body of men or neighbours. *Ma Wun Di v. Ma Kim*, (1907) 35 I.A. 41. In the present case this has been shown. Caution is necessary in comparing English with Oriental customs.

An appeal Court should not disturb the findings of fact. *Khoo Sit Ho* v. *Lim Team Tong*, 1912 A. C. 323, *S. Ammal* v. *K. Subramaniam*, (1930) 1 P.C. 194 and *Colonial Securities Trust Co.* v. *Massey*, (8896) 1 K. B. 38.

He then dealt with the facts and the authorities cited in support of the appellant's case.

Mallal in reply.

Cur. Ad. Vult.

MILLS, J.—On the 7th March, 1932 the Chief Justice directed that an issue be tried with pleadings as to whether the plaintiff Sunny Tay alias Tay Kim Cheng alias Soh Kim Cheng an infant is a legitimate son of Tay Boon Tek now deceased by his wife the said O Tei.

The issue was tried by Terrell, J., who on 7th October, 1932, decided that Sunny Tay is not a legitimate son of Tay Boon Tek by the said O Tei.

The present appeal is from that decision of Terrell, J.

The learned trial judge found that such facts as had been proved to his satisfaction, did not raise a presumption of marriage between Tay Boon Tek a Chinese man and O. Tei, a Japanese woman.

I am compelled respectfully to differ from the trial judge's assertion that except in one or two details the facts of the case are not really in dispute; for instance, O. Tei makes the very important allegation that she and Tay Boon Tek went through a kind of marriage ceremony, proof of a marriage ceremony would be conclusive evidence of marriage; it is therefore clear to my mind that this allegation is not a detail and that it is disputed by the defendants to the issue.

One may summarise the facts which were accepted, or were not rejected by the trial judge, as follows:—

(1) Tay Boon Tek cohabited regularly with O. Tei in the Toronaya Hotel, in the family house of his family, and in various other places for some eight years during the period 1910—1919: and he maintained her for a further 3 years, before deserting her.

(2) Tay Boon Tek recognized O Tei's children as his own children, and Sunny Tay was recognized as a legitimate son by his father's family.

(3) O. Tei lived in the family house for about 12 months during the years 1910 and 1911: Tay Boon Tek's principal wife was also living there at that time, with her children, including one son: during the period 1915—1921 O Tei visited the family house fairly regularly to see her children and occasionally stayed a night or two.

(4) In 1915 Tay Boon Tek and O. Tei took the children to the family house: the children lived there until after the death of Tay Boon Tek in 1922: during the period 1915—1922 the principal wife and her three children, including one son, also lived in the family house.

The trial judge held that these facts were not sufficiently cogent to raise a presumption of marriage: with respect, I am compelled to differ.

In the absence of evidence to the contrary, I consider it almost impossible that Tay Boon Tek should take a mere mistress to live in the family house with his principal wife, especially for so long a period as 12 months; I do not say it would be quite impossible but it would be a most unreasonable act amounting to an outrage, and in my view it would be almost impossible that the principal wife or the other members of the family would tolerate such an outrage; but if they did tolerate it, it is impossible, in my opinion, that they would receive the mistress' children into the family house (particularly as the principal wife had a son), recognize them as legitimate members of the family, and allow the mistress not only to visit them but to stay in the house.

My views on this point are not based on an expert knowledge of Chinese customs and practices, and I should require such customs and practices to be proved, but they are based on study, observation and experience of the Chinese mentality and Chinese ideas, and under the circumstances I consider I am justified in taking judicial cognizance of such ideas.

But the same conclusion may properly be reached, in my opinion, on other grounds: there is no question that among the civilised peoples of Europe and America, a wife would regard it as intolerable that her husband should keep a mistress in the same house as herself; I consider that, in default of evidence to the contrary, the Court is justified in presuming that among the civilized peoples of Asia such a thing would also be regarded as intolerable by an only or principal wife.

In my considered opinion, the facts above enumerated prove, beyond all reasonable doubt, that Tay Boon Tek took O. Tei as his "ts'ip" or secondary wife and that she was so recognized by members of his family, including his principal wife.

I now pass to consider whether there is any other evidence to support the presumption of a lawful marriage.

The trial judge decided there was not; he based his decision on his views of the witnesses' credibility, and on those views I desire to comment.

Before doing so, I wish to make two observations. In the first place, my general impression of the evidence given by the witnesses for the plaintiff is favourable; here again I differ from the trial judge whose impression was that it was unfavourable: general impressions, however, are of little value.

In the second place, the trial judge has arrived at several conclusions, which, in my opinion, are not justified by the evidence.

(1) if there had been a ceremony, some members of the husband's family would have been present,

(2) in view of 12 months' cohabitation before O. Tei was taken to the family house, a ceremony was unlikely,

(3) if O. Tei had been treated as a "ts'ip," Tan Poh Neo would have called her "younger sister,"

(4) O. Tei's children did not know where their father's grave was,

(5) O. Tei ceased to reside in the family house because the principal wife found the position intolerable,

(6) the fact that O. Tei described herself as being an employee of Chinese is inconsistent with the story that she was the wife of a British-born Chinese.

As regards (1), (2) and (3): these conclusions depend on Chinese custom; and there is no proof of any such custom.

On the subject of a ceremony, one might remark that proof of a ceremony is not essential to establish the relationship. (*Cheang Thye Phin* v. *Tan Ah Loy*, 1920 A.C. p. 369), and even when a ceremony is performed "it is not a ceremony of marriage; indeed, the man is not usually present when it does take-place" (*ubi supra*, at p. 375)

It appears to me necessary to emphasize the danger of assuming that customs observed among Chinese families living in China in pre-republican days are applicable, after the establishment of the republic, to Chinese families living in the Straits Settlements; and the danger is accentuated when the persons concerned are not typical members of a Chinese family; for instance, Tay Boon Tek was a speaker of English and a volunteer, while O. Tei was a woman of a foreign race. Suppose a Chinese millionaire took a European woman as a "ts'ip," would his sister call her "younger sister"? I think the Court should not decide such a point without evidence.

It may be—but I do not say it is—as ridiculous to assert that it is the custom for a husband's sister to address her brother's foreign "ts'ip" as "younger sister," as to assert that it is the custom for Chinese men to wear their hair in a "queue."

As to (4): this conclusion is in conflict with the evidence; Sunny Tay, whose evidence is not commented on adversely by the trial judge, says he knows where his father is buried.

As to (5): there is no evidence of this conclusion; there is nothing to suggest that O. Tei was no longer acceptable in the house, or that she did not leave it because she preferred to have a house of her own in which to bring up her family.

As to (6): the mere fact that a woman is employed by Chinese does not prevent her from being the wife of a British subject; and there is no evidence of any circumstances tending to show it unlikely that a woman employed by Chinese should be the wife of a British subject, or that the wife of a British subject should work for Chinese.

I now turn to the subject of the witnesses. The trial judge does not anywhere say that he suspected the accuracy of a witness's evidence because of the manner in which that evidence was given; if he had said so, an Appellate Court would be bound, except in most unusual circumstances, to accept the trial judge's estimate. As it is, the trial judge's view is based on what the witnesses said, and as the evidence is recorded, the Appellate Court may, and ought to, sit in judgment on that view.

The trial judge declines to accept the evidence of the following witnesses:—

(1) O. Tei: the trial judge is unable to accept this witness' allegation that there was a ceremony of marriage; his disbelief is based on his own views regarding Chinese customs: my opinion is that this basis is insufficient in the in the absence of proof of some customs, and I consider that the' trial judge was not justified in being unable to accept O. Tei.

(2) Soh Chye Watt: the trial judge disbelieves this witness' statement that O. Tei was looked upon as Tay Boon Tek's wife; his disbelief is based on the allegation that in 1928 the witness described her as a "spinster": although the witness has given an explanation of this incident, yet he has also admitted giving false information to the Registrar of Marriages and to the Convent authorities, and I agree with the trial judge that his evidence cannot be relied on.

(3) Tay Tan Neo: the trial judge did not regard her as an intelligent or satisfactory witness; he remarks that she appeared to be in poor health and complained of giddiness; he says that she was obviously anxious to do her best for O. Tei: the trial judge does not state in what respect the witness was unsatisfactory and therefore that point must remain in doubt; in my opinion the evidence of a witness ought not to be rejected merely because she is unintelligent, in poor health or giddy: there is no evidence that she was obviously anxious to do her best for O. Tei: the trial judge accepts one of her statements which he regards as of importance: in view of all these matters I do not consider that the trial judge was justified in rejecting the evidence of Tay Tan Neo.

Moreover, there are 2 dead persons whose statements the trial judge disbelieves:—

(a) Tay Boon Tek: the trial judge disbelieves his statement that O. Tei was his wife; the basis of this disbelief is that Tay Boon Tek would be naturally reluctant to admit he was keeping a mistress: my opinion is that this basis is insufficient, and I consider that the trial judge was not justified in disbelieving Tay Boon Tek.

(a) Tan Poh Neo, Tay Boon Tek's principal wife: the trial judge disbelieves her statement that O. Tei was Tay Boon Tek's second wife; his disbelief is based on the possibility that Tan Poh Neo would suggest that O. Tei was a secondary wife rather than admit that her husband was keeping a mistress under the same roof as herself; my opinion is that this basis is insufficient and I consider that the trial judge was not justified in disbelieving Tan Poh Neo.

In my opinion, the plaintiff has succeeded in proving (i) that Tay Boon Tek and O Tei were parties to a species of marriage ceremony, which established their intention to form a permanent union as man and wife, and (ii) that they cohabited as man and wife.

As regards (i): this is established by the evidence of O. Tei: I see no reason for disbelieving her evidence; the very fact that the alleged ceremony was of an unusual nature seems to me to render it unlikely that her story was fabricated: the gift of the photograph by Tay Boon Tek on the morning of the alleged marriage and the affectionate message written on the back indicate, in my opinion, that Tay Boon Tek regarded O. Tei as more than a mere mistress.

As regards (ii); this is established by the following evidence:—

O. Tei deposes that they co-habited as man and wife: O. Tei deposes that her adopted mother paid half of the rent of the house in Syed Alwi Road: it appears to me unlikely that her adopted mother woull have done this if Tay Boon Tek was merely keeping O. Tei as a mistress:

O. Tei deposes that after the alleged ceremony she understood herself to be the wife of Tay Boon Tek and so described herself: this is confirmed by the certificate of registration, wherein she is described in brackets as "Mrs. Tei";

O. Tei deposes, in effect, that everybody, including Tay Boon Tek's younger brother, knew she was wife of Tay Boon Tek; Freeman deposes that Tay Boon Tek introduced O. Tei to him and a Chinese man as his wife;

Andrews deposes that Tay Boon Tek introduced O. Tei to him as his wife;

Andrews deposes that everyone in the hotel knew that O. Tei was "Mrs. Boon Tek";

Tay Tan Neo deposes that Tan Poh Neo, Tay Boon Tek's principal wife, told her that O. Tei was Tay Boon Tek's second wife;

Juliet Tay deposes that O. Tei was treated in the family house as a wife.

The evidence to the contrary is as follows:—

(a) G. B. Taye deposes that he heard no suggestion in 1911 that Tay Boon Tek had taken a secondary wife; in my opinion little weight is to be given to the evidence of this witness: not only was he a party to a transaction which the trial judge regards as dishonest, but he himself admits that he had lost touch with the family in 1911 and continued to be out of touch with the family between 1911 and 1928;

(b) Seah Cheng Joo deposes that he never heard O. Tei referred to as wife of Tay Boon Tek: this is a matter of no significance since the witness was not in touch with the family: but the witness further deposes that in 1915 Tay Boon Tek said he had left his Japanese mistress: now it is clearly proved that Tay Boon Tek had not left O. Tei in 1915: if O. Tei was the Japanese mistress, the explanation of the discrepancy can only be the subject of surmise: this witness' statement is certainly significant, but he is prone to jump to conclusions, for instance, in stating dogmatically "there was no marriage whatever" he makes an assertion which was not

justified by his knowledge of the family: in my opinion he is a partisan witness and only a fair amount of weight is to be attached to his evidence;

(c) Cheah Tiong Kim deposes that in 1915 Tay Boon Tek told several friends that he had given up the Japanese mistress whom he had taken from the Toronaya hotel: I see no reason to disbelieve this witness, and I think considerable weight ought to be attached to his evidence. With regard to these last two witnesses, it is necessary to point out that neither of them distinctly identifies O. Tei as the Japanese mistress in question: even Seah Cheng Joo who was a candidate for the young lady's favours cannot say more than that he believed O. Tei was the girl; possibly they are referring to another Japanese girl; it is clear from O. Tei's account of her quarrel with Tay Boon Tek in 1918 that he was uxoriously inclined: O. Tei deposes that she does not know either of these witnesses and that they did not frequently visit her adopted mother's hotel between 1910 and 1920: my experience of Japanese women is that they are careful to tell the truth.

But, however that may be, the evidence in favour of the conclusion that Tay Boon Tek and O. Tei co-habited as man and wife is, in my opinion, appreciably more weighty than the evidence contrary to that conclusion: and therefore I consider that the Court should regard cohabitation as man and wife to be established.

If either a ceremony of marriage, or cohabitation as man and wife, is established, there is further ground for raising a presumption of marriage.

I am quite unable to agree with the trial judge's conclusion that the evidence indicates that neither Tay Boon Teck nor O Tei herself ever treated their union as a permanent union.

It was argued before the trial judge and before the Court of Appeal that no presumption of marriage arises; it was not argued that, if any presumption arises, the evidence to the contrary is sufficient to rebut it: in my opinion, such a presumption does arise, and the evidence to the contrary is insufficient to rebut it, but under the circumstances it is not necessary to consider that evidence in detail.

There are two other points to which reference ought to be made. The first point concerns the question of recognition of children: in the second *Khoo Thean Tek* appeal (1930 A.C. at p. 356), the Privy Council says that the mere fact of recognition of a person as a son cannot raise any presumption of marriage between the parents: but I do not understand the Privy Council to say that such recognition is not a factor which, taken into consideration with other factors, may help to raise such a presumption; in my opinion it is such a factor and ought to be taken into consideration, and I have taken it into consideration in the present case.

The second point concerns the inference to be drawn from the severance of association between the parties.

In the second *Khoo Thean Tek* appeal (1930 A.C. at p. 353) the Privy Council says, "Moreover, the fact that the association between the parties was in fact severed affords strong evidence that Petronella was never a *t'sip* for according to the evidence of Mr. Beatty (the only expert on Chinese custom who was called) a *t'sip* cannot be put away who has born a son and in the Straits Settlements there is no divorce provided for by the laws for the Chinese."

That finding goes no further than to say that the severance amounts to strong evidence: it does not say that in every case where there has been severance there cannot have been a marriage. On the same page of the report appear the following most cogent reasons for finding that in the *Petroneila* case there was no marriage.

"There are many facts in the case which render it most improbable that Petronella occupied the status of a *t'sip* or that her association with the settlor was intended to be of a permanent nature. She was a Catholic, who never definitely abandoned her religion. So far as the evidence goes no association with the settlor is proved before the date when Khoo Hun Tee was conceived —namely, somewhere about May, 1853. Her illegitimate daughter was born in August, 1856, and baptized within three weeks of birth. Her association with the settlor must have ceased by that time, and in all probability had ceased before the daughter was conceived, i.e. before November, 1855. The period of association between these two persons may, upon the evidence, have only lasted between May, 1853 and November, 1855. But even taking the outside limits of its possible duration—namely, between 1848 (when the legitimate daughter was born) and 1861 (when Petronella married Cornelius), their Lordships are of opinion that there is no evidence that the parties intended their union to be permanent in its nature." So that in that case there was no evidence that the parties intended that the union should be permanent and there was strong evidence from the severance that Petronella was never a "ts'ip."

In the present case the learned trial judge says "I do not say that it is impossible to suppose a case in which a union may have been intended to be permanent and may have been wrongfully

severed by one of the parties, but the mere fact of severance cannot fail to be of importance where such a step has been accepted without protest by the other party to the union." Having regard to all the evidence in the present case, I am satisfied that there was strong evidence that the parties did intend that their union should be permanent in its nature and that such evidence is strong enough to refute any deduction which may be made from the fact that the parties separated some three years prior to the death of Tay Boon Teck.

An Appellate Court will hesitate long before it disturbs the findings of a trial judge based on verbal testimony. But if the Appellate Court is satisfied that the decision of the trial judge is wrong, it is the duty of that Court to reverse his decision.

In the present case I am satisfied that the decision of the trial judge is wrong: in my opinion, the appeal should be allowed, and the question whether Sunny Tay is a legitimate son of Tay Boon Teck deceased by his wife O Tei, should be answered in the affirmative.

As regards costs: I would order that the costs of all parties in both Courts should be taxed as between solicitor and client, and paid out of the estate: this involves, so far as the appellant is concerned, a special order that costs be paid to him under Section 774 of the Civil Proceduro Code.

THOMAS, C. J. (F.M.S.)—I concur.

GERAHTY, J.—I concur.

Appeal allowed.

Solicitor for the Appellant—*N. A. Mallal.*

Solicitors for the Respondents—*Drew & Napier.*